

## REMARKS

The pending Office Action addresses and rejects claims 1-11, 14-17, and 25. Applicants respectfully request reconsideration in view of the amendments and remarks herein.

### *Amendments to the Claims*

Applicants amend claim 11 to correct a typographical error. Support for this amendment can be found throughout the specification and drawings, for example in paragraph [0007]. No new matter is added. Entry after final is proper since the amendment merely addresses a §112 issue.

### *Amendments to the Specification*

Applicants amend the specification as requested by the Examiner to reflect that the parent application has issued as a patent. No new matter is added.

### *Claim Rejections - Double Patenting*

Claims 1-10 are rejected on the ground of nonstatutory obviousness-type double patenting as being obvious over claims 1, 16, 24, 28, 32, 36, and 40 of U.S. Patent No. 7,527,638 (“Anderson”) in view of U.S. Patent No. 5,741,261 (“Moskovitz”). The present application is a continuation-in-part of Anderson and Applicants submit herewith a Terminal Disclaimer with respect thereto, the filing of which should obviate this rejection.

### *Claim Rejections Pursuant to 35 U.S.C. §112*

Claims 11, 14-17, and 25 are rejected pursuant to 35 U.S.C. §112, second paragraph, as being indefinite. Claim 11 is amended to correct a typographical error, thereby obviating this rejection.

### *Claims Rejections Pursuant to 35 U.S.C. §103(a) – “Mathews & Teitelbaum”*

Claims 11 and 14-17 are rejected pursuant to 35 U.S.C. §103(a) as being obvious over U.S. Patent No. 5,357,983 (“Mathews”) in view of U.S. Publication No. 2002/0082598 (“Teitelbaum”). Applicants respectfully disagree.

The Examiner acknowledges that Mathews is deficient with respect to claim 11 because it fails to teach placing a fixation element through a first pathway in an orientation substantially parallel to a longitudinal axis of the first pathway. *See Office Action at 5.* The Examiner relies on

Teitelbaum to remedy this deficiency, however Teitelbaum is equally lacking with respect to this claim limitation.

Claim 11 recites, in part, manipulating a blunt tip of a tool to create a *first pathway* to a first site on a vertebral body. The claimed method also includes advancing a guide wire through the tool (and thus through the *first pathway*), removing the tool, and then advancing an implant along the guide wire to the first site. The claim then recites placing a spinal fixation element through the *first pathway*. In other words, the spinal fixation element of claim 11 is placed through the same pathway as the implant. In Teitelbaum on the other hand, the bone screw (208) is inserted through a working sheath (206) along a first pathway, as shown in FIG. 12. Meanwhile, the Teitelbaum rod (222) is inserted through a second, entirely separate arcuate pathway originating at an incision located a distance from the first, as shown in FIG. 18 and described in paragraph [0081]. Teitelbaum requires this second, separate pathway to allow the rod (222) to be passed through a transverse aperture formed in the head of the bone screw (208).

Accordingly, neither Mathews nor Teitelbaum teaches manipulating a blunt tip to create a first pathway and placing a fixation element through the first pathway as required by claim 11. Claim 11 is therefore not obvious over both Mathews and Teitelbaum, taken alone or in combination, and thus represents allowable subject matter. Claims 14-17 are not obvious and allowable at least because they depend from claim 11.

### ***Conclusion***

Applicants submit that all claims are in condition for allowance, and allowance thereof is respectfully requested. Applicants' amendment of the claims does not constitute a concession that the claims are not allowable in their unamended form. The Examiner is encouraged to telephone the undersigned attorney for Applicants if such communication is deemed to expedite prosecution of this application.

Respectfully submitted,

  
Lisa Adams, Reg. No. 44,238  
Attorney for Applicant(s)

Nutter McClellan & Fish LLP  
World Trade Center West  
155 Seaport Boulevard  
Boston, MA 02210  
Tel: (617)439-2550  
Fax: (617)310-9550